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IN THE

Supreme Court of the United States

October Term, 1969
No. 313

DONALD KALISH,

Petitioner,

vs.

UNITED STATES,

Respondent.

On Petition for a Writ of Certiorari.

REPLY BRIEF OF PETITIONER.

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Petitioner replies to the brief of respondent as follows:

1. Respondent, towards the close of his brief, directly concedes the sole contention made in the petition, that petitioner "has standing to recover a refund of taxes that he has paid" (Br. 7). The petition was limited to that issue of standing because the court below reached solely—not "alternatively" (Br. 7)—that issue.

It may be true, as respondent shows by quotations from *Flast v. Cohen*, 392 U.S. 83, 102-103 (Br. 7-8), that in a suit to enjoin governmental expenditures standing may not be established without an examination of the substantive issues; but that cannot apply in a suit for refund where standing is already established by payment of the specific tax involved and claim for refund. In such case, as *Flast* itself shows, by the state-

ment quoted therefrom in the petition (p. 4), the justiciability of the substantive issues, here the grounds for the claim, is necessarily separate. The decision below is, therefore, in direct conflict with *Flast*. Except for his admission of standing, quoted above, what respondent does in his entire brief is only an attempt to confuse this court by an attack upon the constitutional points which the court below expressly held it did not reach.

2. Again, by a footnote (Br. 6), respondent attempts to sweep aside the conflict of the decision below with *United States v. O'Brien*, 391 U.S. 367. In that case this court, at p. 384, held that it would not "void a statute that is, under well-settled criteria, constitutional on its face, on the basis of what fewer than a handful of Congressmen said about it," but that, p. 385, if it "were to examine legislative purpose" in the case there, it would be obliged to consider not only those statements "but also the more authoritative reports" of the Senate and House committees involved. And here we are dealing, not with *a* purpose, but with the *sole* purpose, and one clearly, unequivocally, in fact, expressly, stated in such reports. The conflict here with *O'Brien* is therefore clear.

It is also clear, and it is significant, that the allowable purposes for a federal tax, contained in Art. I, Sec. 8, cl. 1, of the Constitution, and quoted in *Cincinnati Soap Co. v. United States*, 301 U.S. 308, 313, cited by respondent in this same connection (Br. 6, fn.), do not, as respondent there seems to assume, include the mere raising of revenue without regard to the use to which the revenue raised is to be put. The question of intended use of the revenue to be raised is not avoided, therefore, by the mere absence of any indication of such

use in the taxing act. True, as held in *Cincinnati Soap Co.*, also at p. 313, this court will not concern itself with the question of such use except in "a very plain case." But that then is the standard, "plain"; and the use, the sole use, to which the revenue raised is to be put could not be plainer than it is here. This again confirms the conflict with *O'Brien* here.

3. Respondent goes so far as to charge that this suit is only "nominally" for a tax refund (Br. 7), as if petitioner had a telephone installed and paid the tax on its rental, which he was compelled to pay, not for the purpose of being able to telephone but in order to bring this suit. Petitioner is not even trying in this suit to prevent any expenditure or activity which he believes to be contrary to the Constitution; he is only objecting to being compelled, himself, to participate in such activity by sharing in its cost.

In a broad but basic sense this is the same as the First Amendment position of the appellees in *International Ass'n of Machinists v. Street*, 367 U.S. 740, and also of the appellee in *United States v. Sisson*, now pending before this court, Docket No. 305. If, as respondent contends, the legislative purpose involved here is nonjusticiable because "political" (Br. 6-7), a charge or other burden authorized by law whereby the individual is compelled to give that purpose support is barred by the First Amendment. *International Ass'n of Machinists v. Street, supra*, at pp. 746-749, 767-769. In a broad sense this issue is also presented in *United States v. Sisson, supra*, now pending here.

4. It is obvious also that the court below considered petitioner's constitutional points significant and substantial. It is clear now, too, that respondent is afraid

to give them a complete airing, even in the court below. As indicated in the petition, those points, as presented to the court below, involve the separation of powers, the law of nations, and the First Amendment.

Petitioner would not mind at all if this court required petitioner fully to brief those points, either in support of the petition or, if the writ is granted, after such grant. Unless this court indicated such desire, however, in some manner, we do not believe entitled to impose those points, the court below having expressly held it did not reach them.

5. Because of the concession of respondent quoted under paragraph 1 above on the question of standing to sue, we now ask this court to treat this reply of petitioner as being also a motion to remand to the court below for consideration by that court of the issues it failed to reach because of its conclusion that petitioner lacked standing to sue. We urge this court, in any case, not to leave the issue of standing to sue, in a suit for refund of taxes paid, in the terrible state in which it was left by the decision below.

Respectfully submitted,

GEORGE T. ALTMAN,
Attorney for Petitioner.

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PETITION FOR REHEARING.

Petitioner now petitions this Court for rehearing on his petition for writ of certiorari.

On October 13, 1969, the same date on which this Court denied certiorari herein, it also denied the motion to affirm in *United States v. Sisson,* No. 305, and ordered that case for briefing and argument. We present now in the case here two issues raised in the case there but not presented in the petition for certiorari here.

1. One of those issues is deprivation of due process under the Fifth Amendment if the defense of illegality of the act of Congress or the President involved is held nonjusticiable because it represents a "political" question. That issue is raised in *Sisson,* No. 305. (See Motion to Affirm therein, pp. 19-21.) Precisely the same issue of due process was presented herein in the